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In The

# Supreme Court of the United States

October Term, 1980

No. 79-1477

SEBASTIANA DiMAURO
*Petitioner*

Vs.

GEORGE M. PAVIA, EDGAR A. HARCOURT
d/b/a PAVIA & HARCOURT, and BOSTON
OLD COLONY INSURANCE COMPANY

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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**No.**

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, SEBASTIANA DiMAURO, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Second Circuit rendered in these proceedings on December 28, 1979.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is unreported and appears at Appendix A, *infra,* pp. 1a-3a. The opinion of the United States District Court for the District of Connecticut (granting the defendants' motion for summary judgment) is unreported and appears at Appendix B, *infra,* pp. 4a-33a. The opinion of the United States District Court for the District of Connecticut on the plaintiff's motion to remand is unreported and appears at Appendix C, *infra,* pp. 34a-41a.

## JURISDICTION

The order or judgment of the United States Court of Appeals for the Second Circuit was entered on December 28, 1979. See Appendix A, p. 1a, *infra.* This petition for certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## QUESTIONS PRESENTED

The petitioner commenced this action in the Superior Court of the State of Connecticut seeking damages and equitable relief in connection with the defendants' fraudulent and negligent acts in the administration of the estate of the petitioner's late husband. The defendants removed the case to the United States District Court based on diversity of citizenship. 28 U.S.C. §1332(a)(1). That court granted the defendants' summary judgment motion on the basis of collateral estoppel and equitable estoppel. The United States Court of Appeals for the Second Circuit affirmed. The questions thereby arising are:

1. Whether a District Court should abstain from exercising diversity jurisdiction in a civil action involving a pending probate proceeding where no final decree has been rendered by the probate court. (12 ALRFed 292)



2. Whether Rule 56 of the Federal Rules of Civil Procedure and the doctrine enunciated by this Court in *Granny Goose, Inc.* vs. *Teamsters Local 70.* 415 U.S. 425, 439-440(1974) apply not only to state "temporary restraining orders" but to state court ex parte injunctions generally.

3. Whether a decree of a New York Surrogate's Court may bar claims for negligence and breach of fiduciary duty brought in another state by a beneficiary who has no contacts with the State of New York.

4. Whether summary judgment under Rule 56 of the Federal Rules of Civil Procedure may be rendered against a plaintiff based on the presence of defendants' unverified foreign translations in the district court's file, and where the plaintiff not only is unable to communicate in English but is only "marginal[ly] litera[te] in her native language (Italian).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the Due Process Clause of the Fourteenth Ammendment to the Constitution of the United States; 28 U.S.C. §1450; Section 52-473 of the General Statutes of Connecticut; Section 52-475 of the General Statutes of Connecticut. These are printed in pertinent part in Appendix D, pp. 42a-43a, *infra.*

## STATEMENT OF THE CASE

On January 25, 1970, while the petitioner and her husband, both of whom had been residents of Bridgeport, Connecticut for many years, were visiting Europe, the petitioner's husband suffered a heart attack, resulting in his death and intestacy. Thereafter the petitioner came to the Rome office of duPont (a brokerage firm with offices in Bridgeport where her husband long had maintained a brokerage account) which referred her to the Rome office of the defendant Pavia & Harcourt, a New York based law firm.

Subsequently, the defendant Pavia (of Pavia & Harcourt) assumed the office of administrator of the estate of Orazio DiMauro. Since duPont had an office in New York City, which conveniently was also the defendants' principal office, Pavia undertook administration of the estate in New York, where presumably stock certificates were held.

On June 23, 1970, an attorney from the defendant law firm presented the petitioner with a letter drafted by the defendant law firm. The defendants strongly advised the petitioner to sign the letter, which authorized retention of the stock and, relying on this advice, the petitioner executed the document.

On February 17, 1971, the petitioner received a call from the defendants' Rome office, advising her that the principal stock in the estate (Harvey Stores) had reached a peak of 27. In a subsequent telephone call to the defendants in New York the petitioner consented to the sale of the stock. The following day, by letter dated February 19, 1971, Pavia wrote to the petitioner:

> I regret not having been in my office when you telephoned. However, I know you spoke with my colleague, Prof. Albano Murgi, who then told me what you wanted, that is, that it is your desire that the estate of your husband dispose of the Harvey's Stores shares at a price not less than $30.00 each.
>
> At this point, I must decline any and all responsibility in this regard....

This letter — by far the most enigmatic and most crucial between the parties — purports to have been prompted by a conversation between the plaintiff and a "Prof. Albano Murgi." Yet, not only did Pavia obviously have no personal knowledge of this conversation, but Edgar A. Harcourt of the defendant law firm claimed in his affidavit that it was with *him* that the petitioner spoke. No affidavit was ever tendered by Albano Murgi and the petitioner was never given the name of the party with whom she spoke.



By letter dated February 23, 1971, the petitioner authorized in writing the sale of stock. Between February and September of 1971, the plaintiff pleaded for a meeting with Pavia. Pavia, however, failed to respond.

The estate remained open throughout 1972 and 1973. After the New York probate proceeding was opened in May, 1970 a probate proceeding occurred in the Bridgeport, Connecticut Probate Court in December, 1971 solely for the purpose of processing the decedent's Connecticut estate taxes.[1]

Here, too, Pavia was the administrator. A Connecticut succession tax return was filed in May, 1972. By order dated August 23, 1972, the Bridgeport Probate Court, upon Pavia's representation, recited that the administrator had settled his account and that the entire amount remaining after payment of taxes, debts, fees and expenses *should be distributed to the petitioner.* Pavia then represented that payment to the petitioner *had been made.* No such distribution, however, was made until 1976, upon order of the District Court.

In August, 1973, the petitioner returned to the United States and met with the defendants whereupon she was informed that, although the estate had been substantially depleted due to a diminution in value of Harvey Stores stock, Pavia & Harcourt intended to sell whatever amount of the remaining assets was necessary in order to pay their own fees and commissions.

*Pavia filed his final account* together with a petition for its approval *with the New York Surrogate's Court on January 10, 1974.* A citation was then mailed to the petitioner — four years after the decedent's death. A proceeding was scheduled for February 1, 1974 to settle Pavia's account as administrator. At the

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[1]Because of the limited purpose of the Connecticut probate proceeding, the decree of the Connecticut probate court is not given the broad res judicata attributes imputed to the decree of the Surrogate's Court. *Kochuk* vs. *Labaha,* 126 Conn. 324, 326, 10 A2d 755(1940); *Marks' Appeal,* 106 Conn. 58, 63, 163A600 (1932).

February 1 proceeding, Harcourt appeared for Pavia, and petitioner's Connecticut counsel, while physically present, did not enter an appearance. At the request of petitioner's Connecticut counsel, the proceeding was postponed by the court clerk.

On February 12, 1974 the instant action was commenced in the Superior Court for Fairfield County, Connecticut. At that time, the petitioner applied for and was granted an ex parte injunction, prohibiting Pavia, Harcourt and their law firm from "taking any further action in connection with the estate, including but not limited to any further proceedings in the Surrogate's Court for the County of New York...*except pursuant to further order of this court.*" [emphasis added]

Thereafter, the following chronology of events occurred:

1. By petition dated March 11, 1974, the defendants removed the suit to the District Court on diversity grounds.

2. On October 1, 1974, the District Court denied the petitioner's motion to remand the matter to state court. [Appendix C]

3. On May 22, 1975, the District Court granted the petitioner's motion to compel distribution of the estate.

4. On or about June 12, 1975, the District Court ordered Pavia to turn over to the petitioner all assets of the estate in his possession or subject to his control, less $47,000.00 in dispute.

5. On September 10, 1975, petitioner filed a Motion for Contempt for Pavia's failure to comply with the foregoing order of the Court.

6. On or about September 22, 1975, Pavia filed with the Surrogate's Court despite the existing injunction, an "Affidavit of Services" in which he "request[ed] that the Court grant fees in the amount of $60,000.00, of which $28,000.00 has been paid on account, leaving an unpaid balance of $32,000.00, and that the Court grant commissions in the amount of $15,000.00...."



7. Eleven days thereafter, on October 3, 1975, the Surrogate's Court, without notice or hearing to the petitioner, rendered the "Decree on Accounting" which the courts below have held barred the instant action.

Two years thereafter the defendants moved for summary judgment based on (1) equitable estoppel, claiming the petitioner had consented to the retention of stock from February, 1971 through 1973, and (2) collateral estoppel, claiming that her civil action was barred by the intervening decree of the Surrogate's Court. The District Court granted the defendants' summary judgment motion on both grounds and the Court of Appeals for the Second Circuit affirmed.

## REASONS FOR GRANTING THE WRIT

**1) The decision below is in conflict with this court's decision in *Princess Lida* vs. *Thompson*, 305 U.S. 456 and with the decisions of other circuits — (Abstention)**

*Princess Lida of Thurn an Taxis* vs. *Thompson*, 305 U.S. 456, 59 S.Ct. 275, 83 L.Ed 285, as here, "present[ed] the question whether the exercise of jurisdiction by a state court over the administration of trust deprives a federal court of jurisdiction of a later suit involving the same subject matter."[2] 305 U.S. at 457. In *Princess Lida*, after an accounting had been filed in a state court, as in the instant case, a suit was brought in federal

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[2]The parties as well as the court below are in agreement that the principles with regard to trust funds are equally applicable to decedent's estates generally. See *Mullane* vs. *Central Hanover Bank & Trust Company*, 339 U.S. 306, 311(1956).

court "against the two trustees and the administrators of the deceased trustee, alleging mismanagement of the trust funds and praying that the trustees be removed and all the defendants be made to account and repay the losses of the estate." 305 U.S. at 459. Noting that upon the filing of the fiduciaries' accounting, the jurisdiction of the state court was "exclusive," this Court accordingly held that the federal court was "without jurisdiction" of the suit subsequently brought. 305 U.S. at 467.

*Princess Lida* is fully dispositive of the instant case. Since, when the District Court acted on the petitioner's motion to dismiss, the defendants had filed a final accounting in the Surrogate's Court, the District Court should have abstained from exercising jurisdiction.

Since *Princess Lida,* this court has but once addressed the diversity jurisdiction of the federal court in suits concerning the administration of decedent's estates. See *Markham* vs. *Allen,* 326 U.S. 490, 66 S.Ct. 296, 90 L.Ed 296. Lower courts have taken the initiative in fashioning their own rules, focusing on "whether or not the executor's or administrator's final accounting has been *approved* by a state probate court. Where there has been a final accounting in the state court, federal jurisdiction has generally been upheld...but where there has not yet been a final accounting in the state court, federal jurisdiction has generally been denied..." Annot. 12 ALR Fed 292, 301 [emphasis added]; see *Feist* vs. *Fidelity Union Trust Company,* 29 F. Supp. 51 (D.C.N.J. 1939); *Osterling* vs. *Commonwealth Trust Company,* 35 F. Supp. 704 (D.C.Pa. 1940), affirmed per curiam 115 F. 2d 809 (3rd Cir. 1941); *Starr* vs. *Rupp,* 421 F. 2d 999 (10th Cir. 1970); *Lightfoot* vs. *Hartman,* 292 F. Supp. 356 (D.C.Mo. 1968); *Rousseau* vs. *United States Trust Company,* 422 F. Supp. 447 (D.C.N.Y. 1976). Even under this criterion, of course, the district court should have declined jurisdiction since although the defendants had filed their final account with the Surrogate's Court on January 10, 1974, the decree *approving* the accounting was not rendered until October 1975 — sixteen months after the petitioner moved to remand the action and a year and a half after the defendants had removed the matter to



the federal court. The Second Circuit, however, has deviated even further, evolving an entirely distinct test:

> The standard for determining whether jurisdiction may be exercised is whether under state law the dispute would be cognizable only by the probate court. If so the parties will be relegated to that court; but where the suit merely seeks to enforce a claim *inter partes,* enforceable in a state court of general jurisdiction, federal diversity jurisdiction will be assumed.

*Lamberg* vs. *Callahan,* 455 F. 2d 1213, 1216 (2d Cir. 1972), see also *Tarlton* vs. *Townsend,* 337 F. Supp. 888 (D. C. Miss.); *Bassler* vs. *Arrowwood,* 500 F. 2d 138 (8th Cir.), cert. den. 419 U.S. 116.

By way of dicta, this court also has said that federal courts have jurisdiction "...to entertain suits in favor of creditors, legatees and heirs...against a decedent's estate to establish their claims so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court." *Markham* vs. *Allen,* 326 U.S. 490, 494 66 S. Ct. 296, 298, 90 L.Bd. 256, 259 (1946). In the instant case the District Court, inheriting as it did the injunctive order entered by the Superior Court, became the principal disrupter of the Surrogate's administration of the estate. Not only was administration delayed for a year-and-a-half, but ultimate distribution of the assets of the estate was not made pursuant to the Surrogate's decree but pursuant to the District Court's order of June 12, 1975 directing Pavia to turn over to the petitioner all available assets in his possession or subject to his control less the amount of $47,000.00. Pavia himself pleaded that the District Court had placed him in a dilemma since, he claimed in his Affidavit in opposition to the plaintiff's motion for contempt, he could not comply with the District Court's order without "taking appropriate steps in the Surrogate's Court." The net result was that Pavia indeed did return to the Surrogate's Court where he procured the decree which he later successfully set up as a bar to the petitioner's litigating her case on its merits.

**2) The Decision Below Conflicts with This Court's Pronouncement in *Granny Goose Foods, Inc.* vs. *Teamsters Local 70,* 415 U.S. 425.**

As mentioned *supra,* at the commencement of this civil action in the Connecticut Supreme Court the petitioner applied for and obtained an ex parte injunction prohibiting the defendants from "taking any further action in connection with the estate, including but not limited to any further proceedings in the Surrogate's Court...*except pursuant to further order of this court.*" [Emphasis added] Nonetheless, on or about September 22, 1975, after announcing his intention to return to the Surrogate's Court, Pavia filed with that court, despite the existing injunction, an "Affidavit of Services" in which he "request[ed] that the Court grant fees in the amount of $60,000.00, of which $28,000.00 has been paid on account, leaving an unpaid balance of $32,000.00, and that the Court grant commissions in the amount of $15,000.00...." Eleven days thereafter, on October 3, 1975, the Surrogate's Court, without notice or hearing, rendered the "Decree on Accounting" which the District Court held barred the instant action.

During the pendency of this action, this Court, in *Granny Goose Foods, Inc.* vs. *Teamsters,* 415 U.S. 425, 94 S. Ct. 1113, 39 L.Ed.2d 435 (1974), held that a *temporary restraining order* issued by a state court was not transformed into an order of unlimited duration by 28 U.S.C. §1450 upon removal to the federal court. Beyond the unanimous holding of *Granny Goose,* the Court propounded the following rule:

"An *ex parte* temporary restraining order issued by a state court prior to removal remains in force after removal no longer than it would have remained in effect under state law, but in no event does the order remain in force longer than the time limitations imposed by Rule 65(b) measured from the date of removal." 415 U.S. at 439-440.

The petitioner argued below that since the Surrogate's Court decree was procured in violation of the injunction first obtained in the Superior Court, the defendants could not now set up the



decree as a bar to the instant action. The District Court, however, held, without a scintilla of supporting case law, that "[a]lthough a 'temporary restraining order' (TRO) does not exist in those terms in Connecticut practice, a temporary injunction granted without prior notice and hearing...is *equivalent* to the federal order governed by Rule (65(b), Fed.R. Civ. P." Appendix B, p. 17a. [emphasis added] Accordingly, the District Court held that the injunction entered by the Superior Court had expired after removal pursuant to the rule of *Granny Goose, supra.*

The crux of the issue here is that the Superior Court's injunction was neither in form nor in substance a "temporary restraining order." It was not designated as such. It was not "self-destructing" as are TRO's. Nor was it temporary by its own terms. Moreover, under Connecticut practice the onus is on the persons enjoined to modify or dissolve an injunction. Conn. Gen. Stat. §52-475 [Appendix D]; *Cott Beverage Corporation* vs. *Canada Dry Ginger Ale, Inc.,* 21 Conn. Sup. 244, 245 154 A.2d 140, 141 (1959).

"The Federal Rules of Civil Procedure should be liberally construed, but they should not be expanded by disregarding plainly expressed limitations." *Schlagenhauf* vs. *Holder,* 379 U.S. 104, 121. Since the Superior Court's injunction was not a temporary restraining order, neither the holding nor the rule enunciated in *Granny Goose, supra,* applied. Accordingly, the injunction was in full force and effect when it was violated by the defendants' returning to the Surrogate's Court and procuring a decree. The decree, therefore, could not be set up as a bar to the petitioner's action. See *Byers* vs. *Surget,* 60 U.S. 303, 19 How. 303.

**3) The Decision Below Directly Conflicts With This Court's Holdings In *Shaffer* vs. *Heitner, Rush* vs. *Savchuk* and *Kulko* vs. *California Superior Court.***

It is an ancient — and the petitioner would submit patently anomalous — exception to the principles of collateral estoppel and res judicata that a proceeding to settle a fiduciary's account

settles every right which beneficiaries would otherwise have against the fiduciary for improper management of funds during the period covered by the accounting even in the absence of any adversary proceeding, actual litigation of any fact and even in the absence of minimum contacts of a beneficiary with the forum of the court settling the estate. *Krimsky* vs. *Lombardi,* 357 N.Y.S. 2d 671 (Sup. Ct. 1974); *Matter of Roche,* 259 N.Y. 458 (1932). Thus, in the instant case, the October 3, 1975 decree of the New York Surrogate's Court was deemed to have barred the plaintiff's claims against the defendants despite the wholesale absence of any contacts by the plaintiff with the State of New York.

As in *Kulko* vs. *California Superior Court,* 436 U.S. 84, 91 (1978), the petitioner "does not dispute the adequacy of the notice [she] received, but contends that [her] connection with the State of [New York] is too attenuated...to justify imposing on [her] the burden and inconvenience of "pursuing her claim against the defendants in New York." It is submitted that this Tribunal's recent pronouncements on the requirements for the assertion of jurisdiction plainly mandate summary reversal of the present case. As declared in *Shaffer* vs. *Heitner,* 433 U.S. 186:

> The fiction that an assertion of jurisdiction is anything but an assertion of jurisdiction over the owner's property supports an ancient form without substantial modern justification. Its continued acceptance would serve only to allow state-court jurisdiction that is fundamentally unfair to the defendant.
>
> We therefore conclude that all assertions of state-court jurisdiction must be evaluated according to the standards of *International Shoe* and its progeny.

*Shaffer* vs. *Heitner,* 435 U.S. 186, 212 (1977). Accordingly, a state may no longer use an estate's res to foreclose, as here, a claim against a fiduciary by a beneficiary who has no contacts with the forum state.



While it has been observed that "...the interest of each state in providing means to close [decedent's estates] that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted beyond doubt the right of its courts to determine the interests of all claimants..."; *Mullane* vs. *Central Hanover Bank & Trust Co.,* 339 U.S. at 313; a state has no such interest in the protection of those who, like the defendants, have breached their fiduciary duty, nor will such interests support the exercise of jurisdiction over a nonresident plaintiff with whom the state has no contacts. See *Kulko* vs. *California Superior Court,* 436 U.S. 84, 98 (1978).

In the instant case, the decree of the Surrogate's Court of the State of New York purportedly terminated the plaintiff's claim against the defendants by the fictitious presence in that state of a "res" — here, stock certificates. It is respectfully submitted that such a jurisdictional subterfuge is inconsistent with, if not already overruled by *Rush* vs. *Savchuk,* -U.S.-, 100 S. Ct. 571, -L.Ed.2d- (1980). See also *Shaffer* vs. *Heitner,* 433 U.S. 186. *Kulko* vs. *California Superior Court,* 436 U.S. 84; *World-Wide Volkswagen* vs. *Woodson,* -U.S.-, 100 S. Ct. 559, -L.Ed.2d- (1980).

**4) The Decision Below Directly Conflicts With The Repeated And Consistent Pronunciations Of This Court With Regard To Summary Judgment Procedure.**

In *United States* vs. *Diebold, Inc.,* 369 U.S. 654 (1961), this Court held that "[o]n summary judgment the inferences to be drawn from the underlying facts contained in ["affidavits, attached exhibits, and depositions submitted"] must be viewed in the light most favorable to the party opposing the motion." 369 U.S. at 655. Since the District Court granted summary judgment to appellee, it was required to resolve all genuine disputes as to any material facts in favor of appellants...." *Arnett* vs. *Kennedy,* 416 U.S. 134, 139 (1973); *Bishop* vs. *Wood,* 426 U.S. 341, 347n. 11 (1976). It also would seem to be hornbook law that, "[a]s the moving party, respondent had the burden of showing the absence of a genuine issue as to any material fact,

and for these purposes the material lodged must be viewed in the light most favorable to the opposing party." *Adickes* vs. *Kress & Co.*, 398 U.S. 144, 157 (1970); *Weinberger* vs. *Hynson, Westcott & Dunning,* 412 U.S. 609, 622n. 18 (1973); *Carter* vs. *Stanton,* 405 U.S. 669, 671 (1972).

The District Court based its conclusion that the petitioner was equitably estopped to sue the defendants for the losses resulting from the retention of the stock of the estate on its finding that the plaintiff had consented to this course of conduct. It furthermore found that this consent was intelligently given. See Appendix B, p. 22a.

These findings were made in the face of patently contradictory material allegations by the parties:

(a). The petitioner proffered her sworn testimony (and the affidavit of an independent interpreter, discussed *infra*) that at no time between 1970 and 1973 did she request or direct the defendants not to sell the estate's stock. As stated in her sworn affidavit, the petitioner throughout the administration of the estate relied upon the defendants in all matters concerned therewith, executing whatever documents they placed before her. While the defendants purported to contradict the petitioner's testimony, they did so by proffering only their own affidavits and the affidavits of attorneys associated with the defendant law firm. As this Court has stated, "The mere fact that the witness is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact. *Sonnentheil* vs. *Christian Moretein Brewing Co.*, 172 U.S. 401, 408." *Sartor* vs. *Arkansas Gas Corp.*, 321 U.S. 620, 628.

(b) Moreover, "a district court generally cannot grant summary judgment based on its assessment of the credibility of the evidence presented, see *Poller* vs. *Columbia Broadcasting Co., Inc.*, 368 U.S. 464, 467-468 (1962), 6 J. Moore, Federal Practice §56.02 [10], p. 56-45 (2d ed. 1976)..."*Agosto* vs. *Immigration and Naturalization Service,* 436 U.S. 748, 756 (1977). The District Court, nonetheless, found that the petitioner's testimony



"*clouds some issues but does not raise a genuine issue of fact.*" [emphasis added] Appendix B, p. 33a. As revealed in its decision, the court believed that if enjoyed a license to make such a finding based upon the pronouncement of the Second Circuit that "Rule 56(e) serves the salutary purpose of permitting [the court] to recognize the realit[ies]" of the case; *S.E.C.* vs. *Research Automation Corp.*, 585 F.2d 31, 34 (2d Cir. 1978); thus enabling the court to effectively pierce disputed issues of fact on summary judgment procedure.

While such license not only flies in the face of Rule 56, it is particularly egregious here in view of the petitioner's background which alone was substantial evidence that she was in no position to "direct, induce or consent" to the defendants' actions regarding the buying and selling of securities. Born in Priolo, Siracusa, Italy on January 23, 1914, the petitioner completed only five years of schooling. Until the age of forty-two, she lived in Italy with her two sisters doing only housework. On January 24, 1956 she married her first cousin, the decedent. The only employment which the petitioner has ever had is a "floor girl" at the Norman Dress Company in Bridgeport. Since 1960, the petitioner has maintained but one bank account, the maximum balance of which has been $3,000.00. The petitioner has no children and can neither read nor converse in English. In fact, even her written Italian is of a very elementary level.

The foregoing facts are unvontroverted. They are tendered not to elicit sympathy but to demonstrate that the defendants' contention that the petitioner intelligently consented to the retention of the estate's stock is inherently remote.

(c). Rule 56(c) of the Federal Rules of Civil Procedure authorizes the District Court, in addressing a summary judgment motion, to take notice of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits" in the court's file. The District Court not only availed itself of this prerogative but went further, drawing inferences from the petitioner's deposition and, more importantly, from the defendants' *unverified* translations of correspondence to and from the petitioner.

Thus, the court in note 15 of its Decision (Appendix B) concluded that "a careful inspection of alternative translations of all relevant documents reveals no difference so significant, either in specific words and phrases or in the tone and emphasis of an entire document, as to raise a genuine issue of material fact." It is submitted that such an attempt to draw inferences from unverified translations is plainly inappropriate. The original Italian documents are no doubt saturated by cultural and linguistic nuances. The District Court was in no position and lacked the expertise to glean inferences from the English translations, particularly where this Court has repeatedly insisted that, in disposing of a motion for summary judgment, the court must resolve all ambiguities and draw all inferences in favor of the party against whom summary judgment is sought. *Bishop* vs. *Wood,* 426 U.S. 341, 347n.11; *Arnett* vs. *Kennedy,* 416 U.S. 134, 139 (1973). Moreover, the District Court was timely alerted to the difficulty of drawing inferences and conclusions from translations of the petitioner's correspondence by the Affidavit of Dr. Ralph Marcarelli, Ph.D., doctor of Italian:

> It is apparent from Mrs. DiMauro's letters that her written Italian is of a elementary level. It is also apparent from these documents that this marginal literacy impeded her ability to express herself fully. *This inability to fully express herself is not reflected in the English translations.*
>
> The translations do not adequately reflect the disparity of educational levels between the plaintiff and the parties with whom she corresponded or the consequent disparity of literary expression which is evident in the Italian documents. [emphasis added]

An utter dearth of case law exists as to what, if any, use a district court may make of unverified translations of documents in its file; nor what procedure might be proper. However, it is not inappropriate to observe that Rule 37 of the Supreme Court Rules provides:



> Whenever any record transmitted to this court shall contain any document, paper, testimony, or other proceedings in a foreign language, without a translation of such document, paper, testimony, or other proceedings, *made under the authority of the lower court, or admitted to be correct,* the case shall be reported by the clerk, to the end that this court may order that a translation be supplied and, if necessary, printed as a part of the appendix.

[emphasis added] Here, none of the translations on which the District Court based its judgment were either "made under the authority of the lower court or admitted to be correct...." Moreover, it is not inappropriate to observe — and indeed it is somewhat ironic — that despite the proliferation of international litigation at all levels of the federal judiciary, Rule 37 has never been construed and, apparently, never implemented.

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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This is to certify that a copy of the within petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit, together with Appendices, has been sent, postage prepaid to:

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